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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 357

JOHN SCHROEDER, ET AL., *Appellants*

v.

HOMESTEAD CORPORATION, *Appellant*

Impleaded with

MARGARET A. WILLIAMS, ET AL., *Appellees*

**On Appeal From the Supreme Court of Nebraska**

## MOTION TO DISMISS OR AFFIRM

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**On Appeal From the Supreme Court of Nebraska**

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## MOTION TO DISMISS OR AFFIRM

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss or affirm this appeal on the grounds:

1. That it does not draw in question the validity of any treaty or statute of the United States;

2. That it does not draw in question the validity of any statute of any state on the grounds of its being repugnant to the Constitution, the treaties or laws of the United States; and

3. That it does not involve any substantial federal question, but merely an adjudication of well-settled property law regarding accretion to real estate.

Since the grounds for an appeal under the Rules are lacking, it would seem the papers filed herein should be considered only as an application for a writ of certiorari.

**REGARDING APPELLANTS' STATEMENT OF THE CASE**

This is an appeal from the Supreme Court of Nebraska seeking to invoke the full faith and credit clause (Constitution, Article IV, Sec. 1) to compel Nebraska to recognize and enforce a judgment of a District Court of Iowa.

The only record before this Court is a transcript of the pleadings. The partial bill of exceptions tendered by Appellants to the Nebraska Supreme Court was stricken from the files by that Court for violation of its rules. The Jurisdictional Statement made by Appellants contains a great deal of material that is not in the record before this court, for example: *All references to (Record page —) are to the colored page numbers and not to the typewritten numbers.*

The last paragraph on page 4, all of pages 5, 6, 7, 8, and the first paragraph on page 9 are not supported by the record and no citations are given to support them except two, viz., a map of the land area in dispute (Record pages 28 and 95) and the certificate of the Iowa Clerk with reference to a former

judgment of the State of Iowa (copy not in Record) which notes the appearance in that court in previous litigation of Margaret Williams and W. W. Freeland (Record page 21).

There is no evidence in the record regarding the extent of the value of the property as asserted in paragraph 2 on page 4 of the Jurisdictional Statement.

There is nothing in the record to substantiate the statements in the last half of page 21, except as to Margaret Williams' appearance. (Record page 21).

There is nothing in the record to substantiate the statements in the last paragraph on page 22, going on to page 23, except that W. W. Freeland filed an appearance in this matter June 5, 1946 (Record page 21).

In view of these numerous statements outside the record Appellees feel it desirable to make an independent statement of the case strictly from the record.

## STATEMENT OF THE CASE

### The Petition

Appellant Schroeder, as the sole plaintiff filed a petition in the District Court of Washington County, Nebraska, January 6, 1956 (Record pages 12 and 34) seeking recognition in Nebraska of a certain judgment rendered by the District Court of Harrison County, Iowa, on December 30, 1952, copy of which judgment was attached (Record page 14). The judgment purports to fix title to certain real estate.

The Iowa Judgment attached to the petition runs only against one William W. Freeland and James Olson his agent. Despite the fact that Margaret A. Williams is a named defendant and was apparently served with notice (Record page 20), her

name does not appear in any way in the judgment sought to be enforced, nor do the names of any of the other Appellees.

There is a serious question of the adequacy of service relating to the Iowa Judgment since both Freeland and Williams who are nonresidents of Harrison County, Iowa, were served in Nebraska a Notice to Show Cause in Iowa only nine days before the date set for the hearing on a judgment which was at that time more than six years old (Record page 20). They did not appear and the Judgment was by default against Freeland alone.

Appellant Harrop, who is repeatedly referred to as a "co-owner" of the property, was not a party to the Iowa suit but appeared only as Attorney for Schroeder. The said Iowa decree makes reference to, and purports to be only a reaffirmation of a previous judgment of the Iowa Court, dated December 5, 1946, but no copy of such proceedings or judgment appears in the record (Record page 15).

The decree purports also to be bottomed on another judgment of the District Court of Harrison County, Iowa, in another case dated November 25, 1947, (Record page 15) and no copy of this judgment or proceedings related thereto is in the record.

The decree also depends upon a previous judgment of the U. S. District Court for the Southern District of Iowa, dated October 6, 1937, (Record page 15) but no copy of any such proceedings or judgment appears in the record.

The judgment recites that the court has jurisdiction of the parties and of the subject matter and that the real estate is recorded in the name of Schroeder in

Iowa and is "land lying west of the stabilized channel of the river established by the United States Army Engineers under the Iowa-Nebraska Boundary Compact of 1943 and that said real estate above-described is now situated in Harrison County, Iowa, and contiguous to the State of Nebraska." (Record page 18).

The Iowa Court bottoms a portion of its decree upon the fact that the real estate described "has never been allocated by the Legislature of Nebraska or placed within any county of Nebraska and the District Court of no county in Nebraska has any jurisdiction over said real estate." (Record page 17). The error of the Iowa Court's interpretation of Nebraska law will be discussed hereafter.

No answers of any kind appear to Plaintiff's petition in Nebraska until Appellant Schroeder thereafter applied for a writ of scire facias, (Record page 22), asking the Nebraska Court to dispossess all of the appellees. To this application, which was served on all appellees (Record page 33) the appellees filed answers.

**The Answers**

The answers of the Appellees Cady (Record page 43), Williams (Record page 48), Freeland (Record page 60), Bylund (Record page 53), and Tyson (Record page 64), are all based upon four similar grounds.

1. A claim of adverse possession of more than 20 years (the Nebraska Statute is 10); Sec. 25-202 R. S. Nebr. 1943.

2. Prior judgments of the Nebraska courts antedating the Iowa Judgment by many years and quieting titles in the Appellees or their predecessors to the lands in question;

3. That the land was accreted to the Nebraska side of the Missouri River (west of the main channel of the river, which is the Iowa-Nebraska boundary) over a period of more than 75 years, and, that the Iowa Court was utterly without jurisdiction to render a judgment foreclosing taxes on it, which is the sole basis of Appellants' claimed title.

4. That the Iowa-Nebraska Compact of 1943 had no effect upon the title to the property since it had all accreted to Nebraska land long before any such compact was made; that an interstate compact cannot affect private titles to real estate; further that the Appellants waited 13 years after the Iowa-Nebraska Compact was effective before asserting their rights in Nebraska, whereas the Iowa-Nebraska Compact provides that all such rights must be asserted within five years.

The *Cady* title (Record page 43) is alleged to be based on U. S. Patents, dated 1873-1875, and to the continuous possession through that chain of title ever since.

The answer alleges that Freeland, a predecessor in title, brought an action in the District Court of Washington County, Nebraska, against Harrop to quiet title, and Freeland was adjudged to be the owner of said land by a decree of that Court unappealed from, dated July 27, 1948.

The answer then pleaded that the land had accreted to Nebraska over many years long prior to the levy of any taxes or any entry of any court decree in Iowa.

It then alleged the inapplicability of the Iowa-Nebraska Compact, as well as the effect of the Statute of Limitations contained therein.

The *Williams* answer makes substantially the same allegations as to adverse possession and pleads that by a decree of the District Court of Washington County, Nebraska, dated June 16, 1933, title to said land had been quieted in her husband (Record page 49). The allegations regarding accretion and the effect of the Iowa-Nebraska Compact are substantially the same as the Cady answer.

The *Bylunds* answer alleges adverse possession and then pleads a judgment quieting title in their predecessors in the District Court of Washington County, Nebraska, in the year 1913 and follows substantially the same allegations regarding accretion and the Iowa-Nebraska Compact.

The *Freeland* answer (Record page 61) alleges adverse possession and then pleads an action by Freeland against Harrop et al. as set forth in the *Cady* answer, which decree it is alleged quieted and confirmed Freeland's title and enjoined the defendants, including Harrop, from interfering therewith. The answer makes the same allegations regarding accretion to the appellees' property prior to the time any taxes were levied in Iowa or any judgments rendered by any court in Iowa.

The *Tyson* answer alleges adverse possession and then alleges still another judgment in the District Court of Washington County, Nebraska, in which appellants Harrop, Schroeder and the American Cooperative Company (Homestead Corp.) were all defendants, and that said action resulted in a decree quieting title in the Tysons as against Schroeder and Harrop, dated November 17, 1955, only two months before this suit was instituted (Record page 54).

After these answers to the application for the writ of scire facias had been filed the transcript shows a series of demurrers by the Appellees (Record pages 73 to 82); motions for judgment on the pleadings and motion for summary judgment by Schroeder (Record pages 96-102), all of which were not ruled on by the Nebraska Court but were deferred for ruling until the time of trial.

Subsequently a trial was had on the issues as drawn, which trial continued intermittently over a period of three years and culminated in a decree and judgment entered in the District Court of Washington County on April 12, 1960, denying recognition of the Iowa judgment. (Record page 166). Since it is from this decree alone that the appeal was taken to the Nebraska Supreme Court, the following points of the decree should be noted:

1. The Court accompanied by counsel of both parties prior to the opening of the trial "entered upon and inspected all of the land involved." (Record page 166).

2. The Court found generally against the plaintiffs Schroeder and Harrop (Record page 167); that Defendants Olson and Freeland ceased to claim any interest in the property at the time of judgment.

The Court overruled the demurrers; the various motions for summary judgment; and then held (Record page 167 et seq.) "that when the State of Iowa was admitted to the Union in 1851, the area of land involved in this litigation was east of the Missouri River and was at that time in the State of Iowa, but that commencing in the year 1958 the Missouri River began to slowly and gradually move its channel

to the eastward and by a gradual process of deletion eroded all of said area from the State of Iowa and as said river gradually receded to the East, said area of land was rebuilt to the West of the Channel of said river and was joined to and was accreted to existing land in the State of Nebraska, and thereby ceased to exist in the State of Iowa and became a part of the State of Nebraska." The Court further held (Record page 168) "that all of the area of land involved in this action by said process of deletion and accretion existed in and as a part of the State of Nebraska and was owned by the defendants or their predecessors in title for more than ten years prior to any levy of taxes in Harrison County, Iowa, by said County or the State of Iowa or any governmental subdivision of said state, by reason of which levy of taxes the plaintiffs or their predecessors in title acquired any purported title to any of the disputed area, and that said area so existed more than ten years prior to any purported right or title acquired by the defendant Homestead Corporation, now designated American Cooperative Company." The Court further found that "all of said area of land herein involved had been for many years prior thereto and was then in existence as a part of the State of Nebraska at the time of enactment by the States of Nebraska and Iowa of the Boundary Compact Laws of 1943, and that said Boundary Compact Laws of said states had no application to nor effect upon said land." The Court then found that the Iowa Judgment sought to be enforced was of no force and effect for the "reason that said District Court of Harrison County, Iowa, had no jurisdiction over the land involved in this action, . . ." and held the Iowa judgment invalid and void and not entitled to registration as a foreign judgment.

The Court then specifically found the allegations in the several separate answers by the various defendants "with particular regard to their ownership of the several tracts of land involved herein and as specifically hereinafter described, are true and correct."

This decree was appealed to the Supreme Court of Nebraska but no proper bill of exceptions containing the evidence was presented to that Court. The Supreme Court on motion of appellees struck the bill of exceptions from the file and affirmed the case on the well settled principle that if the evidence is not tendered on appeal and if the pleadings support the judgment, the judgment will be affirmed. (Record page 213) 171 Nebr. 972, 107 N.W. 2nd 750.

It is clear from the foregoing that the judgment here sought to be enforced is only a supplemental judgment, runs on its face against only one of appellees, Freeland, and that the rights of appellants, if any, depend upon the original judgments of the Iowa Court rendered in 1946 and 1947 or a judgment of the Federal District Court of Iowa of October 7, 1937, none of which are in the record.

The only reference in the record upon which the jurisdictional statement of appellants purports to claim the application of res judicata is the certification of the Clerk of the Iowa Court of the 1952 judgment, to which the clerk appended a statement that in the 1946 proceeding "Margaret A. Williams was served in the original petition by publication June 14, 1946, and personally on June 17, 1946; and, I further certify that W. W. Freeland filed an appearance in this matter on June 5, 1946." There is no reference in the record as to whether or not Williams or Freeland pleaded further; as to whether the appearances filed

were general or special; as to whether any trial involving the production of evidence was ever held; as to whether or not appellees Williams and Freeland participated in such trial, or as to the findings of the Court with reference to the facts upon which its jurisdiction was founded.

## QUESTIONS INVOLVED

1. Is the Iowa judgment herein sought to be enforced in Nebraska entitled to full faith and credit under the Constitution Art. IV, Sec. 1 or the Uniform Enforcement of Foreign Judgments Act?

(A) Has the Nebraska Court the right to inquire into and refuse to recognize the Iowa judgment sued upon on the ground that the Iowa Court entering said judgment had no jurisdiction of the subject matter of the action?

(B) Did the Nebraska Supreme Court properly strike from the record the partial bill of exceptions tendered to it by the Appellants as not conforming to the Rules of that Court?

(C) Can this Court, on certiorari, review the judgment of the Nebraska Court in the absence of any evidence whatever in the record upon which the Nebraska Court's judgment is founded?

## ARGUMENT

This case is merely another of the numerous cases over the years involving accretion to land along the banks of the Missouri River, the middle of the main channel of which river constitutes the Iowa-Nebraska boundary. 9 Stat. CLXXXII, 13 Stat. CLIX-2.: If the land in question was accreted to the Nebraska side of the river during the

period from 1858 to about 1920, long before the Iowa judgment was rendered, as the Nebraska Court found, and has been in the possession of the Appellees since the latter date, then the decision is correct. Even if the land in question had been transferred to the Nebraska side of the main channel of the river by avulsion, then the title of the Appellees by adverse possession was also affirmed by the Nebraska Court by its general findings.

Since the basis upon which Nebraska denied enforcement of the Iowa judgment was upon purely factual grounds regarding the action of the Missouri River over a long period of years, and since the Appellants, by failing to comply with the rules of the Nebraska Court, are unable to supply to this Court any of the evidence upon which the Nebraska determination was made, it would seem there is no basis upon which this Court can form any judgment as to the validity of the Nebraska District Court decree, which was affirmed by the Nebraska Supreme Court.

The Iowa judgment here sued upon, under which Appellants claim title to this land, was based upon the foreclosure of taxes levied by Harrison County, Iowa, upon land presumed from the original Government surveys of 1851 to be in Iowa. There is, of course, in the record no indication of what, if any, evidence regarding the actual existence and location of the land the Iowa Court may have had before it when the Iowa judgment was rendered, but the Nebraska Court found that beginning in 1858, by a slow and gradual process, the main channel of the Missouri River, constituting the State boundary, had moved steadily eastward washing away the east (Iowa) bank and at the same time depositing other silt on the west (Nebraska) bank of

the river and that the land thus accreted to the Nebraska land of Appellees; that said land, which is the subject of this suit, had all been on the Nebraska side of the main channel for many years prior to the time that Iowa levied its taxes, Appellants acquired their tax deed and judgment and long prior to the Iowa Nebraska Boundary Compact of 1943 on which Appellants partially rely.

**The Nebraska Court Has the Right to Inquire Into and Refuse to Recognize the Iowa Judgment Sued Upon Here on the Grounds That the Iowa Court, Which Entered Said Judgment, Had No Jurisdiction Over the Subject Matter of the Action**

In *Joseph J. Thompson, Plaintiff in Error,* v. *John Whitman,* 18 Wall. 457, 21 L. Ed. 897, the Supreme Court, speaking through Mr. Justice Bradley, said: "On the whole, we think it clear that the jurisdiction of the Court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the Fourth Article of the Constitution and the Law of 1790, and notwithstanding the averments contained in the record of the judgment itself." This case has been repeatedly followed.

*Knowles* v. *Logansport Gas Light & Coke Co.,* 19 Wall. 58, 22 L. Ed. 70, reaffirmed the preceding case and held that notwithstanding the record of the first judgment showed a return of service personally made upon the plaintiff in error that he was still entitled to show in an action in another state to enforce that judgment that he was not served and that the Court never acquired jurisdiction of his person.

The same rule was again affirmed in *Hall* v. *Lanning,* 1 Otto 160, 23 L. Ed. 271.

In *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 84 L. Ed. 85. The same rule was stated even more succinctly when Mr. Justice Reed said: "The power of the Idaho Court to examine into the jurisdiction of the Washington Court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court."

This rule is affirmed in *Milliken* v. *Meyer*, 311 U.S. 457, 85 L. Ed. 278. See also *Fall* v. *Fall*, 75 Nebr. 104, 113 N.W. 175, *Fall* v. *Eastin*, 215 U.S. 1, 54 L. Ed. 65, discussed hereafter.

The same doctrine has been applied in several divorce cases following *Williams* v. *North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577.

There would seem to be no question of the right of the Nebraska Court to inquire into the jurisdiction of the Iowa Court which rendered the judgment and to determine that the land in question had not existed in the State of Iowa for many years prior to the Iowa judgment and the Iowa Court rendering the judgment had no jurisdiction.

**The Supreme Court of Nebraska Acted Properly in Striking the Appellants' Tendered Bill of Exceptions From the File**

The Nebraska Supreme Court is authorized by statute to promulgate rules of practice regarding the preparation and filing of bills of exception.

Nebr. Laws, 1959, C. 104, § 1, effective September 28, 1959; 1959 Cumulative Supplement Revised Statutes of Nebraska, § 25-1140, provide: "Upon appeal from the District Court to the Supreme Court the party appealing may order a bill of exceptions by filing

in the office of the clerk of the District Court a praecipe therefor within the time allowed for filing a notice of appeal. The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of the bill of exceptions shall be regulated and governed by Rules of Practice prescribed by the Supreme Court."

Pursuant to such authority, the Supreme Court of Nebraska promulgated Rule 7, (page 19 Jurisdictional Statement), which provides, among other things, for the filing with the clerk of the District Court of a praecipe for a bill of exceptions within the time allowed for filing of a notice of appeal.

The Rule further provides: 7 (c) "How Ordered. Unless otherwise specified there, a praecipe requires that *all of the evidence offered at the trial* and *all* of the evidence offered at any hearing on any matter and the ruling thereon be included in the bill of exceptions. *Appellant may*, in the alternative, *specify in the praecipe that less than all of such evidence be included in the bill of exceptions;* however, the bill of exceptions shall be so prepared *only if the written consent of all other parties be endorsed on or attached to such praecipe."* (Emphasis supplied.)

The praecipe filed by Appellants requested only the transcript of Appellants' own testimony and omitted all testimony offered by Appellees. (Record page 179).

Subsequently Appellees appropriately moved for an order to strike the bill of exceptions (Record page 189), supported by affidavit, showing that the testimony of ten appellee witnesses was not included

in the record and that neither Appellees nor their counsel had given any written consent to the presentation of a partial bill of exceptions, nor was such consent "endorsed on or attached to such praecipe" as required by the Rules. (Record pages 191-3).

The said bill of exceptions, as tendered, being clearly in violation of the Rules of the Nebraska Supreme Court, that Court properly sustained the motion and ordered the tendered partial bill stricken from the file. (Record page 209).

It should be further noted that Appellants did not ask the Nebraska Supreme Court for additional time to prepare a complete bill of exceptions on the grounds of hardship or misunderstanding of the rule or seek any relief from said Court from the situation in which they found themselves, but relied instead on attacking the Court's interpretation of its own Rules. It would seem that the right of the Nebraska Supreme Court to interpret and enforce its own Rules when so clearly set forth should be beyond question.

**The Respective Jurisdiction of the Iowa and Nebraska Courts Is Dependent Upon Which State the Land Was Located in at the Time of the Rendition of the Respective Judgments**

This problem is purely one of factual determination on which there is no evidence available to this Court.

This Court long since adopted the well-settled common law relating to accretion and avulsion along the banks of streams and specifically the Missouri River.

As early as 1836 in *New Orleans* v. *the United States*, 35 U.S. 662, 10 Pet. 662, 9 L. Ed. 573, 594, this Court said: "The question is well settled at common law that the persons whose land is bounded by a stream of water which changes its course gradually

by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain."

*Banks* v. *Ogden*, 69 U.S. 57, 2 Wall. 57, 17 L. Ed. 818 (1865) and *Shively* v. *Bowlby*, 152 U.S. 1, 38 L. Ed. 331, 344 (1893) repeat the rule.

This rule has been twice applied by this Court on boundary matters along the Missouri River in a county in Nebraska adjoining that in which the land here under consideration is located.

*Jefferies* v. *East Omaha Land Co.*, 134 U.S. 178, 33 L. Ed. 872 (1890), arose in Nebraska downstream below the land in question. One Jefferies entered claim to Lot 4 along the west (Nebraska) bank of the Missouri River in the United States Land Office in October, 1853. There was constant accretion to the land. The Court said: "At about the time of original entry of Lot 4 by Edmund Jefferies, new land was formed along and against the whole length of the north line thereof and from that time continued to form until 1870, so that in that year, at a distance of 20 chains and more from the original meander line before described, and within the lines of the lot on the east and west running north and south, a tract of forty acres and more had been formed by accretion to the lot and ever since had been and now is a part thereof."

The opinion further said, after quoting the opinions in *New Orleans* and *Banks*, *supra*, with reference to accretion: "The rule is as applicable to the

Missouri River as it is to the Mississippi. Whether the principle on which it rests be that the riparian owner is entitled to the addition to his land because he must bear without compensation the loss of land caused by the action of the water and any consequent expense of repair to the shore, or whether that principle be one of public policy in that it is in the interests of the community that all land should have an owner and most convenient that insensible additions to the shore should follow the title to the shore." Following this, the Court decreed that the land in question belonged to the landowner to whom the land became attached.

In *State of Nebraska* v. *State of Iowa*, 143 U.S. 359, 36 L. Ed. 186, the matter at issue was land along the west (Nebraska) bank of the river claimed by both Iowa and Nebraska. After quoting elaborately from authorities, the Court said: "The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel and that avulsion would establish a fixed boundary, to wit, the center of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri River on account of the rapid and great changes constantly going on in respect to its banks, but the contrary has already been decided by this Court in *Jefferies* v. *East Omaha Land Co., supra.*" . . . . "Our conclusions are that notwithstanding the rapidity of the changes in the course of the channel and the washing from one side and onto the other, *the law of accretion controls on the Missouri River* as elsewhere, and that *not only in respect to the rights of individual land owners, but also in respect to the bound-*

*ary lines between states. The boundary, therefore between Iowa and Nebraska is a varying line so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream.*" (Emphasis supplied.)

On the evidence produced in this particular case the Court held that the change in the river had been sudden by avulsion and did not result in a change of the Iowa-Nebraska boundary. However, the rule therein adopted would seem to settle beyond argument that the boundary line between the two states, which is the center of the main channel of the river, changed with the shifting of the channel and that land accreted to the Nebraska side became land in Nebraska and passed to the ownership of the persons against whose land the accretion was deposited. The Nebraska District Court decree, affirmed by the Nebraska Supreme Court, from which this appeal is taken, recites almost exactly the same historic background (Record page 167) as the preceding Jefferies and Iowa-Nebraska cases, viz., that the accretion to the Nebraska side began shortly after 1858 and continued well past the turn of the century. In the absence of any bill of exceptions before this Court, it is difficult to see on what grounds reversal is sought.

Attention is also invited to a suit between these same parties in the United States District Court, Nebraska, Omaha Division, having the same parties as the present litigation. *Schroeder* v. *Freeland*, 89 F. Supp. 169. The litigation is apparently identical. These same Appellants in that case brought a suit to quiet title to this same land and to eject the tenants therefrom, based their right on the same "tax deeds" which had been issued by the State of Iowa. In that

case, Donohoe, Chief Judge, after reciting the Rule of Law set forth in *Nebraska* v. *Iowa*, *supra*, said: "The plaintiffs cannot maintain this action unless the State of Iowa had authority to levy upon and sell the lands in question. It is true that in the year 1858, these lands were in the state of Iowa. At that time all of these lands were on the east side of the west bank of the river. But since then, the Missouri River has continually moved eastward so that now all the lands in question are on the west side of the east bank of the river. If the river changed its course by a sudden avulsion, then the state of Iowa did not lose jurisdiction of the lands in question and the tax deeds issued to the plaintiffs would be valid. On the other hand, if the river has changed its course by slow accretion, then the state of Iowa has lost jurisdiction of the lands as they have become a part of the State of Nebraska, and more specifically, a part of the estates of the defendants, who reside on the west bank of the river.

"The uncontroverted testimony of several of the witnesses established the fact that the Missouri River has changed its course by a slow process of accretion. The expert testimony of the engineer, and the maps and charts which he clearly explained, illustrated the constant movement of the river to the east from 1856 to 1940. Each survey which was taken during that period of time showed that the river was continually changing its course; and the later the survey, the farther east the course. It is true that the change represented on the maps and charts could have been by an avulsion, but the uncontradicted testimony of those who had lived by the river for years, was that the change was slow; that the water washed away the

land on the Iowa side and later deposited mud and sand on the Nebraska side, as is the case in the ordinary process of accretion. As the alluvial deposits were made, the defendants would extend their boundaries to the edge of the river, thereby increasing their estates.

"[4] In the light of all the evidence, it sems clear that the tax deeds issued by the state of Iowa were of no force and effect because the land was in Nebraska and had, under the rule of *State* v. *Nebraska* v. *Iowa*, *supra*, become part of the estate of the defendants."

While it is true that on appeal, *Schroeder* v. *Freeland*, 188 F. 2d 517, the Court of Appeals, 8th Cir., reversed this case on purely jurisdictional grounds, it is ventured that the factual determinations therein made are substantial confirmation of the Nebraska State Courts' findings.

In *Chicago Mill and Lumber Co.* v. *Tully*, 130 F. 2d 268, 8th Cir., a situation almost identical to the case at bar arose in that claimants had secured tax deeds based upon old descriptions of land which had eroded away and been formed elsewhere by accretion. The Court said: "We think the Master and the Trial Court correctly held that plaintiffs' payment of taxes upon the nonexistent descriptions was unavailing to deprive the defendants of their accretion. Plaintiff concedes that all of the areas surveyed on the Government plats as Sections 18, 19, 20, etc., caved into the Mississippi River and the present formation is all remade, re-formed land and not the land shown in the original survey. There are now no such legal descriptions. (Citing cases.) The defendants were fully protected in their title by their tax payments upon their land by proper legal descriptions for more than forty years. (Citing cases)."

*Anderson-Tully Co.* v. *Chicago Mill & Lumber Co.*, 175 F. 2d 735, 8th Cir. is likewise similar in its facts to the case at bar. The Court said: "[4] The appellants have a tax title to, and for the 24 years preceding the filing of this action have themselves or through predecessors in interest paid taxes on a description 'Frl Section 17, Township 1 North, Range 6 East, in Lee County, Arkansas' and it is shown that that description appeared in the government survey of 1824 and there identified land in place then situated in the same geographical position now occupied by the accretions to appellee's land referred to as the area in controversy in this action. Appellants rely upon that tax title and tax payments.

"But prior to about 1891 the Frl Section 17 marked on the old survey was washed away by the river and was covered by the deep channel. The description ceased to identify any land in place which was subject to individual ownership or use. As the new land was thereafter formed by the accretions and was added to the riparian ownership, that is, to appellee's ownership, the description of the riparian land included the accretion and as the Arkansas court put it, 'All original lines [implied in the old original description] ceased to exist.' *Wallace* v. *Driver*, 61 Ark. 429, loc. cit. 423, 33 S.W. 641, 642, 31 L.R.A. 317. In that situation this court held, in *Chicago Mill & Lumber* v. *Tully*, 8 Cir., 130 F. 2d 268, that in paying taxes on an obsolete description analogous to 'Frl Section 17' of the old survey which had ceased to define land in place subject to private ownership and use did not operate to deprive the riparian owner of the accretions to his riparian land."

**The Appellants' Claim of Res Adjudicata for the Iowa Judgment**

The appellants urge the doctrine of Res Adjudicata as supporting the Iowa judgment.

A short answer is that a judgment never becomes res adjudicata unless the court had jurisdiction of the subject matter, the very question concerning which the court in the sister state has the right to inquire.

Both the courts of Iowa and Nebraska have determined that the decrees of other states, even though valid decrees otherwise, cannot affect the title to real estate within their borders.

*Beach* v. *Youngblood*, 215 Ia. 599, 247 N.W. 545. This was a suit on a promissory note combined with a mortgage foreclosure on Minnesota land. The lower court decreed a lien on the Minnesota land and directed its sale. The Iowa court reversed saying "a decree of a court in this state cannot affect the title to real estate in any other state or in Minnesota."

In *Youngs* v. *Youngs*, 197 Ia. 101, 195 N.W. 795, the Iowa Court said of a New York decree "but even if the said letters had been submitted to the New York Court, the land being in Iowa, determination of the question of the title thereto would be exclusively a matter for determination by the Iowa courts."

In *Fall* v. *Fall*, 75 Nebraska 104, 103 N.W. 175, the Nebraska court affirmed the identical rule. It gave full faith and credit to a Washington State divorce decree insofar as the same was *in personam* but denied its effect so far as the title to real estate in Nebraska was concerned. The same case come to this court on certiorari and appears as *Fall* v. *Eastin*, 215 U.S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65. This court affirmed, point-

ing out that while the Washington judgment was entitled to full faith and credit insofar as the rights of the divorced parties were concerned, that it was not entitled to full faith and credit against lien holders in Nebraska insofar as it undertook to pass title as against such lien holders, jurisdiction of the lands being absent.

Lastly, it should be pointed out that the mere certification of the Iowa clerk that two of these appellants "appeared" in earlier litigation without any showing as to the subsequent course of the litigation, whether they answered; participated in the trial; whether evidence was taken, etc., is not enough to sustain the judgment in any event as being res adjudicata.

**The Iowa-Nebraska Compact Relating to the State Boundaries Is Utterly Irrelevant to This Case**

This compact fixed a channel by surveying points established by the Corps of Engineers, United States Army. At all stages of these proceedings appellants have made the same claims that this boundary compact had some effect on the litigation involved. The compact (Laws of Nebraska 1943, c. 130, p. 434, and Laws of Iowa 1943, p. 797) provides:

Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands shall be accorded full force and effect in Iowa.

Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: Provided, that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

The decree of the Iowa court itself says that these lands are west of that established channel. (Record page 18). If that is true, and the Nebraska court held the same thing, then jurisdiction of the land was ceded to Nebraska. The last sentence of Sec. 4 would have required the assertion of the claims of appellants under the Iowa decree to have been asserted in Nebraska within five years after 1943 or by 1948. The petition in this case was not filed until 1956. This alone would seem to settle any possible effect of the compact on the jurisdiction of the courts.

In addition thereto the court of appeals said in *Schroeder* v. *Freeland*, 188 F. 2nd 517, "It is, however, argued that the point resolution of the legislatures of Nebraska and Iowa, concurred in by Congress, conferred rights upon the parties. But this legislation had no effect upon the title of the lands here involved. As said by the Supreme Court of Texas in *Miller* v. *Letzerich*, 121 Tex. 248, 49 S.W. 2d 404, 407, 85 A.L.R. 451, 'It is elementary that a change of sovereignty does not affect the property rights of the inhabitants of the territory involved.' See, also: *United States* v. *Perche-*

*man*, 7 Pet 51, 8 L. Ed. 604; *Airhart* v. *Massieu*, 98 U.S. 491, 25 L. Ed. 213."

## CONCLUSION

From all of the foregoing it seems that if the factual determination made by the Nebraska Court is true, that all of the accreted land, which appellants seek to recover, has been a part of the State of Nebraska beginning in 1858 and continuing since that time, there was no jurisdiction in the Iowa court over the land in question justifying the rendering of judgments in 1946, 1947 or 1952.

The Nebraska court was entitled to examine the basis of the jurisdiction of the Iowa court; to determine that no such jurisdiction existed in Iowa and that the judgment was not entitled to full faith and credit.

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